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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
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PRIMECO PERSONAL COMMUNICATIONS,

CHIEF CLERK'S OFFICE

v.

Docket No. 00-0670

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,

Complaint pursuant to Sections 13-514 and 13-515
of the Public Utilities Act.

REDACTED

PRIMECO PERSONAL COMMUNICATIONS'
BRIEF ON RECONSIDERATION

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PrimeCo Personal Communications ("PrimeCo"), through its counsel and pursuant to the Illinois Commerce Commission's (the "Commission") May 23, 2001 instructions regarding partial reconsideration of the Commission's April 11, 2001 Decision ("Decision") granting PrimeCo's Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech"), hereby submits PrimeCo's Brief on Reconsideration.

I. INTRODUCTION

PrimeCo is a regional provider of digital wireless telecommunications services. Ameritech is an incumbent local exchange carrier that in 1998 contracted to provide PrimeCo with high-speed transport service, i.e., DS1 service, that is essential to PrimeCo's network operations. The evidence in the record in this Docket showed that at all relevant times – as measured by Ameritech's own performance metrics – the DS1 service Ameritech provided to PrimeCo was substandard. The evidence showed that although Ameritech continually was aware of the fact that its DS1 service was substandard, Ameritech failed to materially improve its DS1 service at any time. The evidence also showed that Ameritech's substandard DS1 service detrimentally affected PrimeCo's ability to compete in Illinois' wireless telecommunications market.

In October 2000, PrimeCo initiated this proceeding against Ameritech in an attempt to compel Ameritech to improve its DS1 service. PrimeCo's claims against Ameritech are exclusively based on Section 13-514 of the Public Utilities Act (the "Act"), 220 ILCS §5/13-514, which prohibits a telecommunications carrier, like Ameritech, from "knowingly impeded[ing] the development of competition in any telecommunications service market," and defines various types of conduct that constitutes per se impediments to the development of competition.

On April 11, 2001, after finding that Ameritech knowingly violated three of Section 13-514's per se provisions, the Commission granted PrimeCo's Complaint against Ameritech. Ameritech subsequently moved for reconsideration and/or rehearing of the Commission's Decision, and on May 23, 2001, the Commission granted in part and denied in part Ameritech's motion. In particular, the Commission partially granted Ameritech's request for reconsideration and directed the parties to brief the following issues:

- (1) whether the record supports the Commission's statement that 'there is no dispute that since executing the 1998 Contract, Ameritech has been aware of poor quality of DS1 service that it provides to PrimeCo';
- (2) whether the Commission failed to properly analyze the reasonableness of Ameritech's conduct thereby violating the plain language and intent of Section 13-514 of the Act....;
- (3) whether the Commission misconstrued and unlawfully modified the 1998 Contract between Ameritech and PrimeCo....; and
- (4) whether the Commission's determination that Ameritech violated three of the per se provisions of Section 13-514 is arbitrary and capricious, unsupported by adequate findings of fact and substantial evidence and/or contrary to applicable law.

August 6, 2001 Memorandum Describing Issues on Reconsideration ("Scoping Memo"), a copy of which is attached as Exhibit A.

As set forth below, the Commission's initial determinations in favor of PrimeCo and against Ameritech are fully supported by the evidence in the record and the applicable law. The record evidence showed that Ameritech continually provided PrimeCo with poor quality DS1 service. Indeed, Ameritech admitted that after entering into its 1998 Contract with PrimeCo, [REDACTED]

[REDACTED]. The evidence showed that Ameritech repeatedly promised PrimeCo that Ameritech would materially improve the performance of its DS1 service, but failed to fulfill any of its promises. The evidence also showed that Ameritech had the ability to take actions or provide services to PrimeCo that Ameritech asserted would improve its DS1 service, but Ameritech failed to take those actions or provide those services. Thus, the Commission's conclusions that Ameritech continually knew its DS1 service was substandard and that it was unreasonable for Ameritech repeatedly to fail to improve its performance and fail to satisfy its many promises to provide PrimeCo with reasonable DS1 service are beyond legitimate dispute. Based on the record, the Commission properly determined that Ameritech's knowing and long-standing provision of substandard DS1 service to PrimeCo violated Section 13-514 of the Act.

Further, the Commission clearly recognized that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. Consistent with the Commission's recognition of this fact, the Commission properly [REDACTED] considering whether Ameritech violated Section 13-514. After concluding that Ameritech had in fact violated three of Section 13-514's provisions defining per se

anti-competitive conduct, the Commission granted PrimeCo relief pursuant to Sections 13-514 and 13-515 of the Act. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Accordingly, as set forth herein and based on the record in this Docket, the Commission should resolve each of the issues on reconsideration in favor of PrimeCo and against Ameritech, grant PrimeCo's Verified Complaint for relief against Ameritech, and issue an order directing Ameritech to cure its violations of Section 13-514 in the manner described in Section III hereof.

II. ARGUMENT

- A. **THE RECORD FULLY SUPPORTS THE COMMISSION'S STATEMENT THAT "THERE IS NO DISPUTE THAT SINCE EXECUTING THE 1998 CONTRACT, AMERITECH HAS BEEN AWARE OF POOR QUALITY OF DS1 SERVICE THAT IT PROVIDES TO PRIMECO"**
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

However, as irrefutably demonstrated by each of Ameritech's own monthly DS1 service performance reports, as well as by the parties' countless discussions regarding the poor quality of Ameritech's DS1 service, the DS1 service Ameritech provided to PrimeCo [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Thus, from the time the 1998 Contract first was executed, Ameritech's DS1 service consistently fell below reasonable levels of minimum performance. Stated otherwise, throughout the relevant term of the 1998 Contract, the quality of Ameritech's DS1 service was "poor", and Ameritech was fully aware of this fact at all times. Id.; Pr. Ex. 1 at 7-9, lines 324-430, at 2, lines 517-19; Pr. Ex. 2 at 12, lines 562-84; Pr. Exs. 2-M, 2-N, 2-P; see Decision at 15 ("Repeatedly needing to make repairs to correct DS1 service quality issues shows Ameritech knew PrimeCo's service quality was impaired.").

The above-described evidence is incontrovertible. It definitively proves that the [REDACTED]

[REDACTED]. It also proves that Ameritech continually had knowledge of its repeated failure to satisfy those minimum standards. Accordingly, the record fully supports the Commission's statement that "there is no dispute that since executing the 1998 Contract, Ameritech has been aware of poor quality of DS1 service that it provides to PrimeCo." Decision at 14.

Notwithstanding the foregoing, Ameritech challenges the Commission's statement that Ameritech continually had knowledge of its poor quality DS1 service to PrimeCo. Ameritech contends that the Commission's statement is unfounded because PrimeCo did not present the Commission with evidence of an industry standard by which to evaluate the quality of Ameritech's DS1 service. Ameritech's contention is meritless.

As Ameritech is well aware, there is no applicable industry standard for DS1 service provided to wireless carriers like PrimeCo, and the Commission has not yet adopted an applicable standard. More importantly, in view of the evidence PrimeCo presented to the Commission – [REDACTED]

[REDACTED] – the absence of an industry standard is immaterial. [REDACTED]

[REDACTED]. Ameritech cannot credibly claim that the reasonableness of its conduct is not properly evaluated by comparison to performance standards that Ameritech itself repeatedly acknowledged were reasonable.

Equally important, liability under Section 13-514 of the Act is not dependent on the existence of an industry standard of reasonableness. See 220 ILCS §5/13-514. Rather, a telecommunications carrier will incur liability under Section 13-514 if it "knowingly" and unreasonably engages in the type of conduct the Act defines as a per

se impediment to competition.² Id.; 21st Century Telecom v. Illinois Bell Tel. Co., ICC No. 00-0219, 2000 WL 1344506 at * 23 (Jan. 15, 2000). Therefore, because there is nothing in the language or intent of Section 13-514 of the Act that requires the Commission to evaluate the reasonableness of a telecommunications carrier's conduct based on an external industry standard, the only relevant issue is whether Ameritech's conduct was unreasonable under any appropriate measure of reasonableness. The evidence in the record shows that Ameritech's conduct was unreasonable under such a measure.

The evidence showed that for well over two years Ameritech consistently failed to provide PrimeCo with DS1 service at performance levels that [REDACTED] were reasonable. Pr. Ex. 1 at 5, lines 219-50; Pr. Ex. 3 at 4, lines 151-84, at 5, lines 206-09. The evidence further showed that Ameritech failed to provide PrimeCo with reasonable DS1 service even though Ameritech repeatedly promised PrimeCo that Ameritech would provide such service, Pr. Ex. 1 at 7-8, lines 324-66, at 9, lines 408-17; Pr. Ex. 2 at 11, lines 496-510; Pr. Ex. 3 at 5, lines 209-27; Cane, 1/17/01 Tr. at 91; even though Ameritech promised PrimeCo that Ameritech would improve its DS1 service, Pr. Ex. 1 at 9, lines 408-17; see Pr. Ex. 2-C; Am. Ex. 1.0 at 15, lines 8-13; even though Ameritech assured PrimeCo that Ameritech had the technological ability to improve its DS1 service, id.; Pr. Ex. 1 at 8, lines 371-84; and even though shortly after Ameritech executed the 1998 Contract, [REDACTED]

[REDACTED]

² The Commission previously determined that Ameritech acted "knowingly." Decision at 14. Because the Commission denied Ameritech's request for reconsideration of this determination, Section 13-514's knowledge requirement is not in issue.

[REDACTED]

[REDACTED]. Based on this evidence, the Commission properly concluded that Ameritech's consistent provision of poor quality DS1 service was unreasonable.

Additionally, there is nothing in the language or intent of Section 13-514 of the Act that requires proof of discriminatory intent.⁴ Decision at 14-15. Thus, Ameritech's reliance on 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506, to support the proposition that proof of discrimination is a prerequisite to recovery under Section 13-514 is misplaced.

In 21st Century Telecom, the Commission denied the complainant relief under Section 13-514 and the Telecommunications Act of 1996, 47 U.S.C.A. §151, et seq., based on the complainant's failure to prove discrimination because the complainant's theory of the case was that Ameritech had discriminated against it and because the federal statute required proof of discrimination. Id. at * 25-27. PrimeCo's Verified Complaint is not based on discrimination. PrimeCo's complaint is based on Ameritech's unreasonable provision of poor quality DS1 service. See Verified Complaint. Accordingly, because proof of discrimination is not a prerequisite to recovery under Section 13-514 and because PrimeCo's Verified Complaint is not based

[REDACTED]

⁴ As related to the conduct of public utilities, discrimination is "the act or practice on the part of a common carrier of discriminating (as in the imposition of tariffs) between persons, localities, or commodities in respect to substantially the same service." Webster's Third New Int'l Dictionary at 648 (1961).

on discrimination, PrimeCo did not have to prove that Ameritech discriminated against it to prevail against Ameritech.

Relatedly, the Commission is not required to evaluate the reasonableness of a telecommunications carrier's conduct in relation to one carrier by comparing it to the level of service provided to other carriers. Such comparative analysis, which is not unlike the analysis required to evaluate allegations of discrimination, may be one way to evaluate reasonableness, but it is not a required or statutorily mandated method of analysis. Thus, Ameritech's claim that PrimeCo's Verified Complaint should be denied simply because PrimeCo allegedly received DS1 service comparable to the DS1 service Ameritech provided to other wireless carriers is unavailing.⁵ Further, the evidence showed that as a regional carrier, PrimeCo competes against national carriers that are not as dependent on their service quality reputations in the Chicago market as is PrimeCo. Pr. Ex. 1 at 2-3, lines 95-101; Pr. Ex. 5 at 3, lines 101-10. Thus, to remain competitive, PrimeCo has to provide better service than its competitors. Pr. Ex. 5 at 3, lines 101-10. Accordingly, even if the DS1 service Ameritech provided to PrimeCo was comparable to the DS1 service Ameritech provided to other carriers ([REDACTED]),

⁵ [REDACTED]

Although Ameritech attempted to impugn the foregoing evidence during the hearing and in its briefs by asserting that the evidence related to "a snapshot in time" and was therefore without significance, Ameritech failed to introduce any facts to refute this evidence.

the poor quality of Ameritech's DS1 service would impair PrimeCo's ability to compete. Pr. Ex. 1 at 6, lines 272-78; Pr. Ex. 5 at 3, lines 101-10, at 5, lines 219-26; see Pr. Ex. 3 at 6-7, lines 295-312; Cane, 1/17/01 Tr. at 99-109.

B. THE COMMISSION PROPERLY ANALYZED AMERITECH'S CONDUCT AND DID NOT VIOLATE THE PLAIN LANGUAGE OR INTENT OF SECTION 13-514 OF THE PUBLIC UTILITIES ACT

The Commission's Decision properly analyzes Ameritech's conduct and correctly concludes that Ameritech violated Section 13-514 of the Act by unreasonably engaging in conduct the Act defines as per se anti-competitive. See Decision at 13-17.

Among other things, the Commission found it "important to distinguish between [Ameritech's] failure [REDACTED] and [Ameritech's] attempts to correct service quality problems." Decision at 15. The Commission further found "Section 13-514 pertains to per se impediments to the development of competition. PrimeCo showing that Ameritech's behavior was unreasonable in addressing the quality of service problem is sufficient." Decision at 14. These findings (and others) clearly reflect the Commission's understanding that Ameritech's liability under Section 13-514 of the Act required proof that the quality of Ameritech's DS1 service was deficient and proof that Ameritech's conduct in response to the documented problems with its DS1 service was unreasonable.

The Commission's clear understanding of the basis on which a telecommunications carrier like Ameritech can incur liability under Section 13-514 also is evidenced by the following Commission findings:

- (1) [REDACTED]

- (2) Ameritech has been trying to remedy the DS1 service problems for three years. The Commission finds three years to be an unreasonable impairment of DS1 service quality to PrimeCo.... Although Ameritech attempted to improve DS1 service quality, these attempts did not ultimately solve the problem in a timely manner."

Decision at 15 (emphasis added).⁶

The above findings plainly show the Commission did not conclude that Ameritech violated Section 13-514 simply because [REDACTED]

[REDACTED]. The Commission found that Ameritech violated Section 13-514 because [REDACTED]

[REDACTED], Ameritech continually failed to fulfill its promises. Decision at 14-15. Thus, it was Ameritech's provision of deficient DS1 service (i.e., DS1 service that failed to satisfy admittedly reasonable minimum performance standards) coupled with Ameritech's unreasonable failure to resolve the problems with its DS1 service over the course of almost two and one-half years (throughout which time Ameritech repeatedly advised PrimeCo that Ameritech would resolve those problems, supra at 7) that led the Commission to conclude that Ameritech violated Section 13-514 of the Act.

Completely disregarding and/or simply misunderstanding the basis of the Commission's Decision, Ameritech has asserted that the Commission improperly held Ameritech strictly liable under Section 13-514 simply because [REDACTED]

[REDACTED]. As

⁶ Based on the execution date of the 1998 Contract, as of the date of the hearing in this Docket, Ameritech actually had been trying to remedy its DS1 service problems for about two years and four months as opposed to three years. Like three years, however, a period of well over two years is much too long to fail to provide DS1 service at admittedly reasonable performance levels.

explained above, Ameritech's assertion is wrong. Consideration of Ameritech's contentions in support of its erroneous assertion further supports this conclusion.

According to Ameritech, the "unreasonable" standard included in Section 13-514 of the Act must be construed in relation to the general purpose of Section 13-514, which Ameritech defines as "protect[ing] the development of competition in a telecommunications market." See Am. Pet. for Rehearing and/or Reconsideration at 7. Under Ameritech's theory, the Commission could find a carrier's conduct to be unreasonable only if the Commission independently determined that the carrier's conduct impeded the development of competition. Id. Ameritech's theory is wholly inconsistent with the legislative intent of Section 13-514's per se provisions.

In Section 13-514 of the Act, the legislature specifically defined certain types of conduct as per se impediments to the development of competition. Thus, when presented with evidence showing that a telecommunications carrier is engaging in the type of conduct the legislature defined as per se anti-competitive, the Commission must conclude, as a matter of law, that the carrier impeded competition. See Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc., 162 Ill. 2d 99, 105, 642 N.E.2d 470, 473 (1994) (quoting Business Elec. Corp. v. Shad Elec. Corp., 485 U. S. 717, 723 (1988) and Maprese v. American Academy, 692 F.2d 1083, 1093 (1982) (emphasis added)) ("*If a practice is within the per se category, all you have to prove to establish a violation is that the defendant engaged in the practice; you do not have to show that in fact the practice has had or will have an adverse effect on competition.*").

Accordingly, the "unreasonable" standard included in Section 13-514's provisions defining per se impediments to the development of competition is not meant to be construed in relation to the general purpose of Section 13-514 (i.e., "protect[ing]

the development of competition in a telecommunications market"). Rather, as illustrated by the following example of the analysis required under Section 13-514(1), the "unreasonable" standard is meant to be construed in relation to the particular conduct of a telecommunications carrier that is being challenged.⁷ 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 23 (emphasis added) ("Each of the prohibited actions listed in Section 13-514 is prefaced with the term 'unreasonably' It must be alleged and shown that the particular transgression was unreasonable in light of all relevant surrounding circumstances.").

Section 13-514(1) of the Act defines the following conduct as a per se impediment to the development of competition, "unreasonably refusing or delaying interconnections or providing inferior connections to another telecommunications carrier." 220 ILCS §5/13-514(1). For purposes of this example, PrimeCo assumes that the connections provided by a telecommunications carrier have been shown to be "inferior". To determine whether the telecommunications carrier's provision of such connections violates Section 13-514(1), the Commission would have to consider whether the carrier's provision of inferior connections was unreasonable. More specifically, the Commission would have to decide whether despite the carrier's purported justification for providing inferior connections, the carrier's conduct was unreasonable in light of any and all relevant circumstances relating to the carrier's provision of such connections. See 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 23. If the Commission determined that the carrier's provision of inferior connections was unreasonable, the Commission properly could conclude that the

⁷ The analysis of Section 13-514's unreasonable standard for Section 13-514(1) is equally applicable to the analysis required under Sections 13-514(2) and 13-514(6), which define the two other types of per se anti-competitive conduct in which Ameritech engaged. See Decision at 14-17.

carrier engaged in the per se anti-competitive conduct defined in Section 13-514(1). Then, as a matter of law, the Commission would have to conclude that the carrier impeded the development of competition. 220 ILCS §5/13-514(1); see Gilbert's Ethan Allen Gallery, 162 Ill. 2d at 105, 642 N.E.2d at 473. Thus, Ameritech is wrong in its contention that the Commission would have to find that Ameritech's provision of inferior connections impaired "the development of competition in a telecommunications market" to conclude that Ameritech's conduct was unreasonable.

As the foregoing example plainly demonstrates, in connection with the per se provisions of Section 13-514 of the Act, Section 13-514's "unreasonable" standard is not meant to be construed in relation to the general purpose of Section 13-514. Instead, it is meant to be construed in relation to the specific conduct in which a telecommunications carrier engages. Accordingly, the Commission's analysis of Ameritech's conduct was correct, and the Commission should reject Ameritech's invitation to disregard the legislature's determination that particular types of unreasonable conduct are anti-competitive per se.

C. THE COMMISSION'S DETERMINATION THAT AMERITECH VIOLATED SECTION 13-514 OF THE PUBLIC UTILITIES ACT NEITHER MISCONSTRUES NOR MODIFIES THE 1998 CONTRACT

As the Commission correctly recognized, PrimeCo's claims against Ameritech are based exclusively on Ameritech's provision of DS1 service that violates Section 13-514 of the Act. Decision at 5. Thus, as the Commission also recognized, PrimeCo's claims are purely statutory. Decision at 5. They are not based on the 1998 Contract between PrimeCo and Ameritech. See Armstrong v. Guigler, 174 Ill. 2d 281, 291, 673 N.E.2d 290, 295 (1996) (citing Mitchell v. White Motor Co., 58 Ill. 2d 159, 162, 317 N.E.2d 505 (1974)). [REDACTED]

[REDACTED]

Accordingly, the Commission did not have to construe or otherwise interpret the provisions of the 1998 Contract to resolve PrimeCo's Verified Complaint. Thus, the Commission's Decision cannot properly be challenged as misconstruing or modifying that contract.

1.

[REDACTED]

[REDACTED]

Among other things, Section 13-514 of the Act defines various types of conduct as per se anti-competitive. Examples of such conduct include:

- (1) unreasonably refusing or delaying interconnections or providing inferior connections to another telecommunications carrier;
- (2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier; [and]
- (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.

220 ILCS §5/13-514(1), (2) and (6).

Under Section 13-514, a telecommunications carrier that unreasonably engages in the conduct described in any of the above provisions is considered to have impeded competition as a matter of law. 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 23.

To determine whether a telecommunications carrier's conduct is unreasonable necessarily requires an understanding of the parameters of reasonable conduct. On the facts of this case, the parameters of reasonable conduct are crystal clear. The undisputed evidence in the record showed that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The evidence showed:

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
- [REDACTED]

In addition, based on Section 13-509 of the Act, the 1998 Contract's minimum performance standards are presumptively reasonable. See 220 ILCS §5/13-509 ("A telecommunications carrier may negotiate with customers ... to provide competitive telecommunications service, and in so doing, may offer or agree to provide such service on such terms ... as are reasonable....").

In view of the foregoing, it was entirely appropriate for the Commission to use the 1998 Contract's reasonable minimum performance standards to evaluate the

⁸ See footnote 3.

reasonableness of Ameritech's conduct under Section 13-514 of the Act. The fact that there are no applicable industry standards and no standards adopted by the Commission which the Commission could have used to evaluate Ameritech's conduct further support this conclusion.

Without citing any authority, Ameritech challenges the propriety of the

[REDACTED]

[REDACTED]. This purely conclusory argument is nothing more than a red-herring and is easily dismissed.

As expressly stated in 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 23 (emphasis added) – and emphasized by Ameritech throughout this proceeding – to prevail on a claim under Section 13-514, “[i]t must ... be alleged and shown that the particular transgression was unreasonable in light of *all relevant surrounding circumstances*.” In this case, one of the most significant “surrounding circumstances” [REDACTED]

[REDACTED]

Without a doubt, these circumstances are highly relevant in this proceeding where the issue is whether the DS1 service Ameritech provided to PrimeCo was reasonable. [REDACTED]

[REDACTED]

[REDACTED]

2.

[REDACTED]

[REDACTED]

Under well-settled Illinois law,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. The Commission Properly Ordered Ameritech to Provide PrimeCo with DS1 Service [REDACTED]

In Section 13-515 of the Act, the Illinois legislature expressly authorized the Commission to order a telecommunications carrier to modify its conduct if the Commission determined that the telecommunications carrier was knowingly impeding the development of competition in a telecommunications service market. 220 ILCS §5/13-515(d)(7) (pursuant to Section 15-515(d)(7) of the Act, the decision resolving a complaint under Section 13-514, "if a violation of Section 13-514 is found, [shall include] directions and a deadline for correction of the violation"). Therefore, after finding that Ameritech violated Section 13-514, the Commission had the authority to order Ameritech to modify its conduct and to provide PrimeCo with DS1 service that satisfied reasonable performance standards.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In its Decision of April 11, 2001, the Commission granted PrimeCo's request.

By ordering Ameritech to provide PrimeCo with DS1 service [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The Commission's Decision cannot be characterized as "specifically enforcing" the 1998 Contract simply because the relief the Commission granted incorporates certain terms of that contract. See Armstrong, 174 Ill. 2d at 291, 673 N.E.2d at 295 (the nature of relief does not control the determination of whether a claim is based on a contract).

D. THE COMMISSION'S DETERMINATION THAT AMERITECH ENGAGED IN PER SE ANTI-COMPETITIVE CONDUCT IS NOT ARBITRARY AND CAPRICIOUS, IS NOT UNSUPPORTED BY ADEQUATE FINDINGS OF FACT AND SUBSTANTIAL EVIDENCE, AND IS NOT CONTRARY TO APPLICABLE LAW

As the Commission properly found, Ameritech violated three of Section 13-514's per se provisions. Decision at 14-17. In particular, the evidence showed Ameritech:

- "unreasonably ... provid[ed] inferior connections to another telecommunications carrier." 220 ILCS §5/13-514(1); Decision at 14-15;
- "unreasonably impair[ed] the speed, quality, or efficiency of services used by another telecommunications carrier." 220 ILCS §5/13-514(2); Decision at 15; and
- "unreasonably act[ed] or fail[ed] to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers." 220 ILCS §5/13-514(6); Decision at 15-16.

The evidence showed that Ameritech continually provided PrimeCo with inferior connections. Specifically, the evidence showed that Ameritech DS1 circuits constitute essential connections in PrimeCo's network. Pr. Ex. 1 at 2, lines 85-89. DS1 circuits

are the facilities over which electronic signals representing telephone calls are transmitted from PrimeCo cell sites to PrimeCo's mobile switching center ("MSC"), from which point the telephone calls are transported to their termination points. Pr. Ex. 1 at 2, lines 75-87; Pr. Ex. 1 at 4, lines 192-97. If a DS1 circuit fails, the PrimeCo cell site served by that circuit cannot use that circuit to communicate with PrimeCo's MSC. Pr. Ex. 1 at 5, lines 201-02; Cane, 1/17/01 Tr. at 99. As a consequence, telephone calls being transmitted by the failed DS1 circuit will be dropped unless the signals are picked up by an alternate cell site. Pr. Ex. 1 at 5, lines 201-06; Cane, 1/17/01 Tr. at 97-101; see Pr. Ex. 3 at 3-4, lines 295-312. (Significantly, even if signals are picked up by an alternate cell site, the quality of the telephone calls may be impaired because the signals may not be as strong as they would have been if they had been transmitted over the failed DS1 circuit. Pr. Ex. 1 at 5, lines 203-14; Pr. Ex. 5 at 3-4, lines 144-52; Cane, 1/17/01 Tr. at 101-02.) Further, as previously explained, the evidence showed that the DS1 service Ameritech provided to PrimeCo failed to satisfy minimum performance standards that Ameritech admitted were reasonable. Supra at 4-5.

Based on this evidence, it was eminently proper for the Commission to concluded that [REDACTED]

[REDACTED]

[REDACTED] See Decision at 15 [REDACTED]

[REDACTED], violate Section 13-514 because Ameritech provided inferior connections compared to what it promised in the contract.”).

Based on the same evidence, the Commission also properly concluded that Ameritech impaired the speed, quality, or efficiency of the DS1 services used by PrimeCo. Decision at 15. The DS1 service Ameritech provided to PrimeCo failed to satisfy reasonable minimum performance standards [REDACTED]

[REDACTED] See Decision at 15 ("Repeatedly needing to make repairs to correct DS1 service quality issues shows Ameritech knew PrimeCo's service quality was impaired.").

The evidence of Ameritech's failure to provide PrimeCo with DS1 service that satisfied reasonable minimum performance standards also supports the Commission's conclusion that Ameritech acted or failed to act in a manner that had a substantial adverse effect on PrimeCo's ability to provide service to its customers. The evidence showed that during the relevant time period, the failure of Ameritech DS1 circuits caused [REDACTED] on PrimeCo's network. Pr. Ex. 1 at 6, lines 283-86; Pr. Ex. 1-C; see Pr. Ex. 3 at 5, lines 206-09; Pr. Ex. 5 at 3, lines 131-32, at 4-5, lines 200-04. The evidence showed that due to the interrelation of PrimeCo's cell sites, DS1 circuit failures necessarily have an adverse impact on PrimeCo's operations. Cane, 1/17/01, Tr. at 106-09. In particular, by preventing PrimeCo cell sites from communicating with PrimeCo's MSC, Ameritech's poor DS1 service adversely affected PrimeCo's ability to provide service to its customers by causing telephone calls to be lost, preventing calls from being made in the first instance, or impairing the quality of the calls. Pr. Ex. 1 at 5, lines 201-10; Pr. Ex. 3 at 6-7, lines 295-12; Pr. Ex. 5 at 3-4, lines 144-52; Cane, 1/17/01 Tr. at 97-102. Also, due to the frequency and duration

of Ameritech DS1 circuit failures, PrimeCo incurred significant additional costs to operate its network, [REDACTED]

[REDACTED]. Pr. Ex. 1 at 6-7, lines 256-319; Pr. Ex. 5 at 4-5, lines 154-68, 197-204, 219-24.

Importantly, the evidence also showed that Ameritech's provision of substandard DS1 service to PrimeCo was unreasonable. As the Commission found, over a quite lengthy period of time, Ameritech failed to materially improve the quality of the DS1 service it provided to PrimeCo even though: (1) Ameritech was well aware of the serious and continually unresolved problems with its DS1 service; and (2) [REDACTED]

[REDACTED]. See Decision at 15 ("Failing to correct the problem after [two and one-third] years constitutes an unreasonable impairment of service quality under 13-514(2).").

The evidence further showed that Ameritech unreasonably failed to takes steps to materially improve the performance of its DS1 service. Decision at 14-15. Among other things, Ameritech failed to: (1) replace the copper facilities it used to provide DS1 service to PrimeCo with fiber facilities, [REDACTED]; (2) widely install [REDACTED] designed to prevent outages from occurring by switching traffic from an active DS1 circuit to a standby circuit in the event of a failure on the active circuit; and (3) proactively monitor the performance of the majority of PrimeCo's DS1 circuits. Pr. Ex. 2-N.

Accordingly, as set forth above, the record fully supports the Commission's conclusion that Ameritech violated Sections 13-514(1), (2) and (6) of the Act.⁹

III. REQUESTED RELIEF

Based on Ameritech's violation of Section 13-514 of the Act, PrimeCo reiterates the requests for relief included in its March 20, 2000 Petition for Review; namely, that the Commission order Ameritech to:

- (1) Ensure that by April 1, 2002 (or another date certain selected by the Commission) the DS1 service Ameritech provides to PrimeCo continually satisfies the following reasonable performance standards:
 - (i) unavailability of [REDACTED] during no fewer than seven months in every twelve-month period, and (ii) a failure rate of [REDACTED] during no fewer than seven months in every twelve-month period (except that if at any point between the entry of the Commission's Decision and April 1, 2002 (or other date certain) Ameritech fails to meet the standards of [REDACTED] unavailability per month for any six months of such period, or of [REDACTED]

⁹ In its Scoping Memo, the Commission expressly cautioned the parties "to restrict their discussion [on reconsideration] to the issues identified by the Commission", Ex. A, and PrimeCo acknowledges that the competitiveness of Ameritech's DS1 service is not an issue the Commission specifically authorized the parties to address. However, in light of questions raised by Hearing Examiner Zaban, PrimeCo believes it important and appropriate to note that PrimeCo has never asserted that Ameritech's DS1 service is not a competitive service. In fact, as more fully explained in PrimeCo's Reply Brief, Ameritech's DS1 service is a "competitive" service. Pr. Feb. 14, 2001 Reply Brief, §A(1)(b) at 10-12; see 220 ILCS §5/13-502 (a "competitive" service is a service that "for some identifiable class or group of customers in an exchange ... or some other clearly defined geographical area ... is reasonably available from more than one provider. ..."). Among other things, the evidence presented in this proceeding showed that within Ameritech's Illinois service territory, DS1 service is available from more than one provider. See Pr. Ex. 2 at 14-16, lines 677-738; Cane, 1/17/01 Tr. at 76, 91-92. Thus, the fact that obtaining DS1 service from an alternative service provider is not a viable option for PrimeCo does not call into question the competitive status of Ameritech's DS1 service.

██████ failure rate per month for any six months of such period, Ameritech shall be in violation of this Order);

- (2) Within 21 days of the date on which the Commission enters its order, provide PrimeCo and the Commission's Staff with a copy of an Action Plan describing the specific actions Ameritech will take to satisfy the performance standards set forth above, the expected results of each of the planned actions, and the date(s) on which each action will be taken;
- (3) Grant PrimeCo leave to respond to Ameritech's Action Plan within ten days of PrimeCo's receipt of the Plan, and order Ameritech to seek in good faith to resolve any issues regarding the Action Plan that PrimeCo may raise;
- (4) Grant the parties leave to request Commission review of the Action Plan in this Docket in the event they are unable to resolve any issues regarding the Action Plan;
- (5) Order Ameritech, on a monthly basis throughout the term of the 1998 Contract (including any extensions), to provide PrimeCo and the Commission's Staff with a report regarding the status of Ameritech's implementation of its Action Plan, as well as monthly reports setting forth its performance results for DS1 Service provided to PrimeCo in Illinois, which reports shall measure the unavailability and failure rate of Ameritech's DS1 service;
- (6) Order Ameritech to make the data on which its monthly performance reports are based available for review by the Commission's Staff and/or PrimeCo upon request; and

(7) In accordance with Section 13-515(g) of the Act, order Ameritech to pay all of the Commission's costs of investigation and conduct of the proceedings in this Docket.

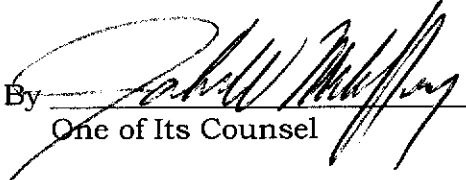
IV. CONCLUSION

For the reasons stated herein and otherwise appearing of record in this Docket, PrimeCo Personal Communications respectfully requests that the Commission enter an order directing Ameritech to correct its violations of Section 13-514 of the Act by providing PrimeCo with DS1 service that satisfies the reasonable performance standards identified in the above Request for Relief and by complying with each and every one of the remaining provisions of PrimeCo's Request for Relief.

Dated: September 4, 2001

Respectfully submitted,

PRIMECO PERSONAL COMMUNICATIONS

By  _____
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PROOF OF SERVICE

I, Kathleen R. Pasulka-Brown, one of counsel to PrimeCo Personal Communications, hereby certify that a copy of the foregoing Brief on Reconsideration was served on each of the persons on the attached Service List, at the addresses specified, by e-mail and Federal Express on September 4, 2001.

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